(3)

No. 01-1651

Supreme Court, U.S.
FILED
JUN 25 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SAVE PALISADE FRUITLANDS, a Colorado unincorporated nonprofit association, HARRY C. TALBOTT, GALEN R. WALLACE, and ALLEN M. (MAC) WILLIAMS,

Petitioners,

v.

MONIKA TODD, in her official capacity as County Clerk of Mesa County, Colorado and BOARD OF COUNTY COMMISSIONERS OF MESA COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD W. DAILY
ALLAN L. HALE
SCOTT E. GESSLER
RICHARD A. WESTFALL
Counsel of Record
HALE HACKSTAFF TYMKOVICH, LLP
1430 Wynkoop Street, Suite 300
Denver, CO 80202
(720) 904-6000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pgs

TABLE OF CONTENTS

	Page
INTRODUCTION	1
REASONS FOR GRANTING THE WRIT	1
I. THE DISTRIBUTION AND EXERCISE OF THE DIRECT DEMOCRACY VOTING FRANCHISE IS AN IMPORTANT QUESTION OF FEDERAL LAW	1
II. THE COURT SHOULD CLARIFY THE STANDARD OF REVIEW THAT APPLIES TO STATE RESTRICTIONS PLACED ON THE CITIZENRY'S RIGHT TO INITIATIVE	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) 6

BE & K Construction Co. v. NLRB, No. 01-518, 2002 WL 1357297 (U.S. June 24, 2002) 3

Bullock v. Carter, 405 U.S. 134 (1972) 4

Burdick v. Takushi, 504 U.S. 428 (1992) 4, 6

Carrington v. Rash, 380 U.S. 89 (1965) 5

Cipriano v. City of Houma, 395 U.S. 701 (1969) 4

Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981) 4

City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 4, 5

Dunn v. Blumstein, 405 U.S. 330 (1972) 5

Evans v. Cornman, 398 U.S. 419 (1970) 5

Kelly v. Macon-Bibb County Board of Elections, 608 F. Supp. 1036 (M.D. Ga. 1985) 2

Meyer v. Grant, 486 U.S. 414 (1988) 4

Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291 (6th Cir. 1993) 2

Town of Lockport, New York v. Citizens for Community Action at Local Level, Inc., 430 U.S. 259 (1977) 2, 3, 5

Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, No. 00-1737, 2002 WL 1305851 (U.S. June 17, 2002) 3

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U. S. CONST. amend. I 3, 6

U. S. CONST. amend. XIV 6

STATUTES

Colorado Enabling Act, 18 Stat. 474 (1875) 2

RULES

Sup. Ct. R. 10(c) 1

OTHER AUTHORITIES

Letter to William Charles Jarvis, September 28, 1820, 10 WRITINGS OF THOMAS JEFFERSON (Ford ed., 1899) 2

INTRODUCTION

The decision of the Tenth Circuit should not be allowed to stand, because it incorrectly suggests that governments have the right to exclude whole classes of citizens from the exercise of a set of fundamental rights, simply because of where they live.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari demonstrates why the Petition should be granted, because it accurately identifies the crucial issues and illustrates the confusion surrounding the proper standard of review. Because of this confusion in the applicable standard, this Court should directly address the application of the Equal Protection Clause to the distribution and implementation of the direct democracy franchise.

REASONS FOR GRANTING THE WRIT

I. THE DISTRIBUTION AND EXERCISE OF THE DIRECT DEMOCRACY VOTING FRANCHISE IS AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner asks this Court to articulate the Equal Protection standards that apply to the right to participate in direct democracy. Direct democracy forms a critical part of American self-governance, and this Court has not applied the Equal Protection Clause to the distribution of the direct democracy voting franchise when a state denies certain citizens the right to hold initiative elections, while allowing other similarly situated citizens to exercise that right. Accordingly, this is "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c).

Direct democracy, in the form of initiative and referendum, plays a critical role in the American form of self-governance. In many instances, it forms the foundation of political power. For example, the United States Congress requires that all state constitutions receive the approval of a majority of the people of a state. *See, e.g.*, Colorado Enabling Act, 18 Stat. 474 (1875). The vast majority of American citizens exercises the right to initiate and pass legislation, particularly on the local level. Indeed, Americans' widespread use of the initiative and referendum most accurately reflects Thomas Jefferson's belief that there is "no safe depository of the ultimate powers of the society but the people themselves. . . . " Letter to William Charles Jarvis, September 28, 1820, 10 WRITINGS OF THOMAS JEFFERSON (Ford ed., 1899) at 161.

In light of the profound importance that direct democracy has in American government – particularly at the state and local level – this Court should take the opportunity to provide guidance in evaluating Equal Protection standards as they affect the distribution of the direct democracy franchise. Respondent Todd claims that *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993) and *Kelly v. Macon-Bibb County Board of Elections*, 608 F. Supp. 1036 (M.D. Ga. 1985) have conclusively settled the proper Equal Protection standards that apply to the exercise and distribution of the right to initiative and referendum. In fact, this Court has not directly applied Equal Protection standards to access to the direct democracy franchise, leaving it an open question of law. In *Town of Lockport, New York v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 266-272 (1977), this Court upheld the New York law which required dual-majority approval of a county self-

government charter, i.e., approval both by all city voters who resided in cities within the affected county, voting as a unit, and by all other voters in the affected county, also voting as a unit. In approving this dual-majority voting scheme, the Court noted that "[t]here is no indication that the classifications created by New York law work to favor city voter over town voter, or town voter over city voter." *Id*, at n. 18. That Court specifically recognized the possibility that such geographic classification schemes could in fact result in constitutional injury, but did not address the standard to determine whether such an injury has occurred. This Court should complete the analysis begun in *Town of Lockport*, and review Colorado's denial of the right of direct democracy to residents of statutory counties, while allowing that right to residents of home rule counties, cities and towns.

This Court has ruled on related issues, but never directly on the issue presented in the present Petition for Certiorari. Direct democracy is an amalgam of a number of fundamental rights, the regulation of which has received strict constitutional scrutiny. These rights include anonymous door-to-door solicitation and canvassing, and the right to petition. *See, e.g., Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, No. 00-1737, 2002 WL 1305851, at *10-11 (U.S., June 17, 2002) (reiterating the principle that requiring a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the heart of constitutional guarantees); *BE & K Construction Co. v. NLRB*, No. 01-518, 2002 WL 1357297, at *6 (U.S., June 24, 2002) (the right to petition is one of the most precious of the liberties safeguarded by the Bill of Rights). The Court has applied First Amendment protections to individuals participating in

initiative elections. *Meyer v. Grant*, 486 U.S. 414 (1988); *Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981). The Court has also used the Equal Protection Clause to analyze citizen's right to vote in elections, as well as candidates' right to access the ballot. *See, e.g., Bullock v. Carter,* 405 U.S. 134 (1972); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Likewise, the Court has relied on an equal protection analysis to hold that individuals who do not own property may not be barred from participation in direct democracy elections. *See, e.g., City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (persons who are not owners of property may not be barred from voting in a bond referendum); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (persons who are not owners of property may not be excluded from bond election). This case now gives the Court the opportunity to articulate clear Equal Protection standards that states must meet when regulating the distribution and exercise of the direct democracy voting franchise.

II. THE COURT SHOULD CLARIFY THE STANDARD OF REVIEW THAT APPLIES TO STATE RESTRICTIONS PLACED ON THE CITIZENRY'S RIGHT TO INITIATIVE.

This is a case of first impression. In the present case, Colorado denied certain citizens the ability to participate in the direct democracy franchise, while at the same time granting it to others similarly situated. Accordingly, this Court should articulate the proper standard of Equal Protection review. That review is based on three factors: "the character of the classification in question; the individual interests affected by the classification; and the

governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). This Court has used more than one test in determining the proper standard of review, depending on the character of the classification or the individual interests affected by the classification. *Id.*

This Court has not previously articulated an Equal Protection standard governing a state's distribution and implementation of the direct democracy franchise. Specifically, the Court has not evaluated the types of classifications that arise from selective implementation of the direct democracy franchise, nor has it examined the individual interests affected by those classifications.

Respondent's assertion that the right to initiative is not a fundamental right guaranteed by the U.S. Constitution is irrelevant, because this Court has not required invocation of a fundamental right prior to applying stricter Equal Protection scrutiny. Rather, it has looked at the distribution of the voting franchise and the practical impact on individual voters. *Evans v. Cornman*, 398 U.S. 419, 422 (1970). Likewise, Respondent's focus on suspect classifications is misplaced. This Court's balancing test has disallowed voting distinctions based on various classifications that normally would not be considered "suspect," including geography, *Cornman, supra*, military status, *Carrington v. Rash*, 380 U.S. 89 (1965), and ownership of property. *City of Phoenix v. Kolodziejski*, 390 U.S. 204 (1970). Indeed, in *Town of Lockport*, 430 U.S. at 272, n. 18, this Court suggests that any scheme that would automatically favor one voter over another based on residence in a particular type of political subdivision is inherently suspect.

Respondent's reliance on *Burdick v. Takushi*, 504 U.S. 428 (1992) is misplaced, because *Burdick* relied on a First and Fourteenth Amendment analysis, not an Equal Protection analysis. Although this Court has used an Equal Protection Clause analysis to inform its approach to First and Fourteenth Amendment claims, it has nonetheless unequivocally stated that an analysis under the First and Fourteenth Amendments is separate from an Equal Protection Clause analysis. *Anderson v. Celebrezze*, 460 U.S. 780, 786 n. 7 (1983). Respondent's misapplication of the proper test only reinforces the need for this Court to adopt clear Equal Protection standards. As one example, Respondent posits a classification scheme that distinguishes sovereign political entities from non-sovereign political entities. It indicates Respondent's efforts to identify and apply a proper standard by which to evaluate Petitioner's claims, despite the absence of authority for such a distinction. This Court should provide such a standard.

CONCLUSION

The Court should grant this petition and directly address the application of the Equal Protection Clause to the distribution and implementation of the direct democracy franchise.

Respectfully submitted,

HALE HACKSTAFF TYMKOVICH LLP

RICHARD W. DAILY
ALLAN L. HALE
SCOTT E. GESSLER
RICHARD A. WESTFALL
1430 Wynkoop St.
Suite 300
Denver, Colorado 80202
Telephone: (720) 904-6019

Counsel for Petitioners